U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 6949201

Date: NOV. 29, 2019

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior systems analyst. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate its required ability to pay the combined proffered wages of this petition and those it filed for other beneficiaries.

The Petitioner bears the burden of establishing eligibility for the requested benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a petition, a foreign national may finally apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ABILITY TO PAY THE PROFFERED WAGE

A petitioner must demonstrate its continuing ability to pay the proffered wage of an offered position, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R.

§ 204.5(g)(2). For petitioners with less than 100 employees, as in this case, evidence of ability to pay must include copies of annual reports, federal tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated annual amounts of net income or net current assets sufficient to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may consider additional factors affecting a petition's ability to pay a proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[1]

Here, the labor certification states the proffered wage of the offered position of senior systems analyst as $114,500 a year. The petition's priority date is June 29, 2018, the date DOL received the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The record indicates the Petitioner's employment of the Beneficiary in nonimmigrant work visa status since September 2015. As evidence of its payments to the Beneficiary in 2018, the year of the petition's priority date, the Petitioner submitted copies of payroll records and an IRS Form W-2, Wage and Tax Statement. The Form W-2 indicates that the Petitioner paid the Beneficiary $113,189.25 in 2018. This amount does not equal or exceed the annual proffered wage of $114,500. Thus, based solely on wages paid, the record does not establish the Petitioner's ability to pay the proffered wage. Nevertheless, we credit the Petitioner's payments. It need only demonstrate its ability to pay the difference between the proffered wage and the wages paid in 2018, or $1,310.75.

On appeal, the Petitioner argues that it pays the Beneficiary $61.50 an hour, or $127,920 a year, an amount exceeding the proffered wage. It therefore asserts that it has the "*de facto*" ability to pay the proffered wage. As the Petitioner argues, the Beneficiary's payroll records indicate an hourly rate of $61.50, and, based on a 40-hour work week, his annual pay at that rate would total $127,920. But the 2018 Form W-2 indicates that the Petitioner paid the Beneficiary less than the proffered wage of $114,500. The Petitioner has not explained the discrepancy or otherwise demonstrated that it paid the Beneficiary at least the proffered wage in 2018. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record with independent, objective evidence pointing to where the truth lies). The payroll records do not reflect payments to the Beneficiary before December 30, 2018, so he may not have worked 40 hours a week for the entire year. Thus, based on the Petitioner's payments to the Beneficiary, the record does not establish the company's ability to pay the proffered wage.

The Petitioner submits a copy of its federal income tax return for 2018. The return reflects net income of about $50,000 and net current assets of more than $200,000. Both these amounts exceed the $1,310.75 difference between the proffered wage and wages paid in 2018. Based on either net

[1] Federal courts have upheld USCIS' method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Rahman v. Chertoff*, 641 F. Supp. 2d 349, 351-52 (D. Del. 2009).

income or net current assets, the record therefore appears to demonstrate the Petitioner's ability to pay the proffered wage.

As the Director found, however, USCIS records indicate the Petitioner's filing of immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this and its other petitions that were pending or approved as of this petition's priority date of June 29, 2018, or filed thereafter. *See Patel v. Johnson*, 2 F.Supp.3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, the petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).[2]

According to USCIS records, the Petitioner filed nine other petitions that were pending or approved as of June 29, 2018, or submitted thereafter. In response to the Director's written request for additional evidence and on appeal, however, the Petitioner provided the proffered wages of only eight of the petitions.[3] Without the remaining proffered wage, we cannot calculate the total combined proffered wages that the Petitioner must demonstrate its ability to pay. The Petitioner therefore has not established its ability to pay the proffered wage.

Even if we overlooked the missing proffered wage, the record would not demonstrate the Petitioner's ability to pay in 2018. Combining the Beneficiary's proffered wage with the eight others provided, the record indicates total proffered wages of $876,360. The Petitioner documented that it paid five of the 10 beneficiaries – including the Beneficiary here – a total of $608,867.45 in 2018. Subtracting wages paid from the total proffered wages leaves $267,492.55 that the Petition must demonstrate its ability to pay. Neither the Petitioner's net income of $49,860[4] nor its net current assets of $216,064 for 2018 would equal or exceed that amount.

On appeal, the Petitioner submits unaudited financial statements for 2018 indicating its generation of annual net current assets of almost $1 million, including more than $750,000 in accounts receivable that its tax returns omitted. The Petitioner, however, has not explained why the financial statements report annual net current assets almost five times greater than those listed on its tax returns, nor has it documented the accounts receivable listed in the statements. The record therefore does not demonstrate the reliability of the unaudited financial statements for 2018. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies with independent, object evidence).

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[2] The Petitioner need not demonstrate its ability to pay proffered wages of petitions that it withdrew, or that USCIS rejected, denied, or revoked. The Petitioner also need not demonstrate its ability to pay proffered wages before the priority dates of corresponding petitions, or after corresponding beneficiaries obtained lawful permanent residence.

[3] The record lacks the proffered wage of the petition with the receipt number [redacted]

[4] The Petitioner chose to be treated as an S corporation for federal income tax purposes in 2018. S corporations list income, deductions, and credits from outside their businesses on Schedule K to IRS Form 1120S, U.S. Income Tax Return for an S Corporation. *See* U.S. Internal Revenue Serv. (IRS), "Instructions to Form 1120S," 21, https://www.irs.gov/pub/irs-dft/i1120s--dft.pdf (stating that "Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc."). The Petitioner listed deductions outside of its business in 2018. We therefore consider line 18, "Reconciliation," of the Petitioner's Schedule K to more accurately reflect its net income.

As previously indicated, we may consider factors affecting the Petitioner's ability to pay beyond the wages it paid the Beneficiary, its net income, and its net current assets. Under *Sonegawa*, we may examine: how long the Petitioner has conducted business; its number of employees; growth of its business; its incurrence of uncharacteristic losses or expenses; its reputation in its industry; the Beneficiary's replacement of a current employee or outsourced service; or other factors affecting the Petitioner's ability to pay. *See Matter of Sonegawa*, 12 I&N Dec. at 614-15.

Here, the record indicates the Petitioner's continuous business operations since 1994 and, as of the fourth quarter of 2018, its employment of 25 people. Copies of the Petitioner's federal income tax returns also reflect continuous increases in gross annual revenues from 2016 through 2018. Unlike the petitioner in *Sonegawa*, however, the Petitioner here has not demonstrated its incurrence of uncharacteristic losses or expenses, or its possession of an outstanding reputation in its industry. Also, the record does not demonstrate the Beneficiary's replacement of a current employee or outsourced service. Also unlike the petitioner in *Sonegawa*, the Petitioner here must demonstrate its ability to pay multiple beneficiaries. As previously indicated, because the Petitioner did not provide information about one of its other petitions, we cannot calculate the company's total proffered wages. But, based on the current record, a totality of circumstances under *Sonegawa* would not establish its ability to pay.

For the foregoing reasons, the Petitioner has not demonstrated its ability to pay the proffered wage. We will therefore affirm the petition's denial.

III. THE REQUIRED EDUCATION

Although unaddressed in the Director's decision, the Petitioner also has not demonstrated the Beneficiary's possession of the minimum educational requirements of the offered position. A petitioner must establish that a beneficiary met all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the primary requirements of the offered position of senior systems analyst as a U.S. master's degree or a foreign equivalent degree in computer science, computer applications, engineering (electronics, mechanical, civil, or electrical), management information systems, or business administration, with no required training or experience. The certification also states the Petitioner's alternate acceptance of a bachelor's degree and five years of experience. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include a bachelor's degree followed by at least five years of progressive experience in the specialty). Part H.14 of the labor certification specifies the Petitioner's acceptance of a bachelor's degree in the following fields of study: "Computer Science, Applications, [or] Engineering (Electronics/Mechanical/Civil/Electrical)."

On the labor certification, the Beneficiary attested that, by the petition's priority date, an Indian university awarded him a bachelor's degree in computer science and engineering. The Petitioner

submitted a diploma and marks statements from the university indicating the Beneficiary's possession of a bachelor of engineering degree. The Petitioner also submitted an independent evaluation of the Beneficiary's foreign educational credentials, concluding that his foreign degree equates to a U.S. bachelor of science degree in computer engineering.

As required by the offered position and the requested visa classification, the record establishes the Beneficiary's possession of the foreign equivalent of a U.S. bachelor's degree. But, contrary to the specific requirements of the offered position, the Petitioner has not demonstrated his possession of a degree in an acceptable field of study. As previously indicated, part H.14 of the labor certification specifies the acceptable fields of a U.S. baccalaureate equivalency as "Computer Science, Applications, [or] Engineering (Electronics/Mechanical/Civil/Electrical)." The record indicates that the Beneficiary's degree equates to a U.S. baccalaureate in "computer engineering." Computer engineering appears to differ from the fields of computer science and applications. *See, e.g.*, The Univ. of Maine, "Similarities and Differences CE [Computer Engineering]/CS [Computer Science]," https://ece.umaine.edu/prospective-students/computer-engineering-overview/similarities-and-differences/ (last visited Nov. 18, 2019) (stating that computer science programs traditionally focus on "the theoretical underpinnings of computation and programming," while computer engineering programs "build on an engineering student's knowledge of electronics and circuits").

Also, the Petitioner specified the acceptable baccalaureate sub-fields in engineering as "Electronics/Mechanical/Civil/Electrical." The acceptable sub-fields do not include computer engineering. The record therefore does not establish the Beneficiary's possession of a bachelor's degree in an acceptable field of study. Thus, in any future filings in this matter, the Petitioner must submit additional evidence demonstrating that, by the petition's priority date, the Beneficiary obtained either a master's or bachelor's degree in a specified, acceptable field.

IV. CONCLUSION

The record on appeal does not establish the Petitioner's ability to pay the combined proffered wages of this petition and those it filed for other beneficiaries. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.